

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of)	MM Docket No. 97-128
)	
Martin W. Hoffman, Trustee-in-Bankruptcy)	File No. BRCT-881201LG
For Astroline Communications Company)	RECEIVED
Limited Partnership)	
)	APR 19 2000
For renewal of license of)	FEDERAL COMMUNICATIONS COMMISSION
Station WHCT-TV, Hartford, Connecticut)	OFFICE OF THE SECRETARY
)	
and)	
)	
Shurberg Broadcasting of Hartford)	File No. BPCT-831202KF
)	
For Construction Permit for a New)	
Television Station to operate on)	
Channel 18, Hartford, Connecticut)	

To: The Commission

**ENFORCEMENT BUREAU'S COMMENTS IN SUPPORT OF
JOINT REQUEST FOR APPROVAL OF SETTLEMENT AGREEMENT**

1. On April 4, 2000, Martin W. Hoffman, Trustee-in-Bankruptcy for Astroline Communications Company Limited Partnership ("Hoffman"), Two If By Sea Broadcasting Corporation ("TIBS"), and Alan Shurberg, d/b/a Shurberg Broadcasting of Hartford ("Shurberg") filed a joint request for approval of settlement agreement ("Joint Request"). The Enforcement Bureau¹ submits the following comments in support.

2. Background. The instant settlement looks toward ending a hearing proceeding that had its genesis more than 16 years ago, when Shurberg first filed an application to

¹ By Order, 14 FCC Rcd 17924 (1999), the Commission created the Enforcement Bureau, effective November 8, 1999. One of the functions of the Enforcement Bureau is to serve as trial staff with regard to matters designated for hearing. See Section 0.111(b) of the Commission's rules, 47 C.F.R. § 0.111(b). Consequently, the Enforcement Bureau is formally replacing the Mass Media Bureau as a party to this proceeding.

obtain a construction permit to operate on channel 18 in Hartford, Connecticut. (File No. BPCT-831202KF). Shortly thereafter, the Commission effectively dismissed Shurberg's application and granted the application of Astroline Communications Company Limited Partnership ("Astroline"), Hoffman's predecessor in interest, to acquire the license for Station WHCT-TV, from Faith Center, Inc., pursuant to the Commission's minority distress sale policy.² Although Shurberg's appeal of the Commission's decision regarding Astroline ultimately was upheld by the Supreme Court,³ Shurberg's persistence and related circumstances contributed to Astroline's financial demise, which resulted in Hoffman's appointment as a Trustee-in-Bankruptcy for Astroline in 1991. In 1993, Hoffman and TIBS entered into an agreement, which looked toward the sale of WHCT-TV's assets to TIBS. *See* File No. BALCT-930922KE. However, Shurberg raised questions about TIBS' qualifications⁴ and those of Astroline, resulting in the commencement of the instant hearing proceeding.⁵ Currently, this proceeding is before the Commission following the filing of exceptions to the Initial Decision of Administrative Law Judge John M. Frysiak, FCC 99D-1, released April 16, 1999 ("Initial Decision"), which concluded that the public interest would be served by a grant of Hoffman's application. Because of the pendency of Shurberg's application, however, should the Commission uphold the Initial Decision, the Commission still faces the

² *See Faith Center, Inc.*, 99 FCC 2d 1164 (1984).

³ *See Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990).

⁴ *See Two If By Sea Broadcasting Corporation*, 12 FCC Rcd 2254, 2257 (1997).

⁵ *See Hoffman, Martin W.*, 12 FCC Rcd 5224 (1997).

prospect of a comparative renewal hearing involving Shurberg and Hoffman and/or TIBS.

3. The instant settlement contemplates not only the termination of this proceeding, but also the dismissal of Shurberg's application, grant of Hoffman's application, and grant of Hoffman's application to assign the license of WHCT-TV. However, rather than have the license go to TIBS, the original assignee, the settlement, as modified by the assignment application amendment discussed, *infra*, proposes that Entravision Holdings, LLC ("Holdings") be substituted as assignee. In exchange, Holdings proposes to pay Hoffman \$18,000,000. In turn, Hoffman would pay TIBS \$9,520,000 and Shurberg \$7,480,000. Hoffman would retain \$1,000,000 for the remaining expenses of the bankruptcy estate.

4. Discussion. Section 311(d)(1) of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. § 311(d)(1), provides that when a broadcast renewal application and one or more mutually exclusive construction permit applications are pending before the Commission, no such application can be dismissed in exchange for money pursuant to an agreement without prior Commission approval. Pursuant to subsection (d)(3), Commission approval can occur only if the agreement is consistent with the public interest and no party-applicant to the agreement filed his application for the purpose of reaching such an agreement. For the reasons that follow, the Bureau submits that the agreement is consistent with the public interest and that no party-applicant filed his application for the purpose of reaching a settlement.

5. The Bureau believes it self-evident that approval of the joint request will provide immediate tangible public interest benefits: termination of Commission litigation

and termination of a related bankruptcy proceeding. First, assuming that Holdings will be found qualified, settlement will end a contest for channel 18 in Hartford that began more than 16 years ago. Settlement will not only terminate the instant litigation, but will also obviate the need for a second proceeding, a comparative renewal proceeding involving Hoffman/TIBS and/or Holdings as the incumbent renewal applicant and Shurberg as the competing construction permit applicant. Termination of Commission litigation has long been viewed as a significant public interest benefit.⁶ Second, settlement will permit closure of the Astroline bankruptcy proceeding. In this regard, the amount ultimately available to Hoffman, \$1,000,000, is the amount previously approved by the Bankruptcy Court for the sale of WHCT-TV's assets.⁷ It has long been Commission policy that, to the extent possible, its actions should accommodate federal bankruptcy law.⁸ Finally, again assuming that Holdings will be found qualified, channel 18 will be licensed to an entity with a history of broadcast operations.

6. Notwithstanding the public interest benefits outlined above, an arguable public interest detriment is the fact that a dismissing construction permit applicant, Shurberg, is to receive compensation for dismissing that application. In Prevention of Abuses of the Renewal Process, 4 FCC Rcd 4780 (1988), *recon. granted in part and denied in part*, Comparative Renewal Process, 5 FCC Rcd 3902 (1990) ("Prevention of Abuses"), the Commission promulgated Section 73.3523 of the Commission's rules, 47 C.F.R. §

⁶ See, e.g., Western Connecticut Broadcasting Co., 88 FCC 2d 1492, 1496-97 (1982); Allegan County Broadcasters, Inc., 83 FCC 2d 371, 372-74 (1980).

⁷ See "Station Sale and Settlement Agreement" (February 28, 2000), p. 2 (Recital I and referenced Exhibit 8), attached to the joint request as Exhibit B.

⁸ See O.D.T. International, 9 FCC Rcd 2575, 2576 (1994). See also LaRose v. FCC, 494 F.2d 1145 (D.C. Cir. 1974).

73.3523. That rule was designed to foreclose situations where renewal applicants were forced to pay large settlements to challenging applicants with questionable public interest goals by limiting the amounts of such payments. Essentially, the rule proscribes payments to a dismissing challenger prior to the issuance of an Initial Decision relative to its application. Moreover, even after issuance of an Initial Decision, the rule limits the amount to the challenging applicant's legitimate and prudent expenses. In the instant situation, an Initial Decision has not yet been issued relative to Shurberg's application; nevertheless, the settlement contemplates that Shurberg will receive more than \$7,000,000.

7. Although the rule appears to bar the instant settlement, at least with respect to the proposed payment to Shurberg, the Bureau submits that, in light of recent precedent, waiver of the rule is warranted. In Trinity Broadcasting of Florida, Inc., 14 FCC Rcd 20518 (1999), the Commission, *inter alia*, approved a settlement that proposed to pay dismissing challengers sums far in excess of any expenses they had incurred. Moreover, Commission approval occurred even though some of the dismissing challengers' applications had not yet reached the Initial Decision stage. In so acting, the Commission determined that the challengers had not filed their applications for the purpose of reaching a settlement. Further, the Commission noted that because of uncertainties in the comparative renewal process, "unnecessary prolongation of comparative renewal proceedings does not serve the public interest." Id., 14 FCC Rcd at 20522. Finally, the Commission observed that changes in the Act rendered unnecessary enforcement of the rule in pending cases. Id. See also EZ Communications, Inc., 12 FCC Rcd 3307 (1997). Inasmuch as there is no evidence suggesting that Shurberg filed his application for the

purpose of reaching a settlement, application of Trinity and EZ to the instant settlement warrants waiver of Section 73.3523 of the rules with respect to the proposed payment to Shurberg.⁹

8. Another arguable impediment to grant of the joint request is the substitution of Holdings for TIBS. In this regard, Commission policy generally disfavors approval of settlements involving so-called “white knights,” that is, entities that will eventually acquire the authorization even though they have not previously been a party-applicant.¹⁰ However, in Normandy Broadcasting Corp., 13 FCC Rcd 23332 (Ass’t Gen’l Counsel, Administrative Law Division 1998), a settlement agreement was approved that, *inter alia*, contemplated the grant of renewal of broadcast licenses to an entity that was not the original renewal applicant but was, essentially, a “white knight.” In determining that approval of the settlement would serve the public interest, that ruling observed that the Commission was inclined to waive its policy against “white knight” settlements when doing so would facilitate resolution of frozen hearing cases. The ruling further concluded that, since approval would resolve a frozen comparative renewal proceeding, waiver of the policy would serve the public interest. Id., 13 FCC Rcd at 23333. As in that case, approval of a white knight settlement in the instant situation will facilitate resolution of a

⁹ In Prevention of Abuses, 4 FCC Rcd at 4784, the Commission stated that restrictions on settlement payments would not apply when the settlement resulted in the sale of the station to one of the competing applicants or the incumbent dismissed its application. Although neither situation is occurring here, the ultimate departure of Hoffman as licensee and the insertion of a non-party as licensee appear to be analogous to the dismissal of the incumbent.

¹⁰ See Amendment of Parts 1, 73 and 74 – Competitive Bidding, 13 FCC Rcd 15920, 15947 (1998); Rebecca Radio of Marco, 5 FCC Rcd 937, *recon. denied*, 5 FCC Rcd 2913 (1990).

comparative renewal situation. Accordingly, waiver of the white knight policy is warranted.


9. Unlike the Normandy case, however, the instant situation does not involve the amendment of an application already in hearing. Rather, it involves the substitution of a new assignee. Section 73.3578(b) of the Commission's rules, 47 C.F.R. § 73.3578(b), prescribes that when an assignment application is amended with the result that the proposed assignee's ownership reflects a change in control, the amendment is a "major amendment." Such amendments are subject to the provisions of Sections 73.3580 and 73.3584 of the Commission's rules, 47 C.F.R. §§ 73.3580 and 73.3584.¹¹ Section 73.3580 requires the applicant, in this case, Holdings, to provide public notice of the application's filing, while Section 73.3584 subjects the applicant to the possibility of a petition to deny. In view of these provisions, the Enforcement Bureau urges that the Commission delay final approval of the settlement until the Mass Media Bureau can process the application and determine whether Holdings is qualified to hold the license for channel 18.¹²

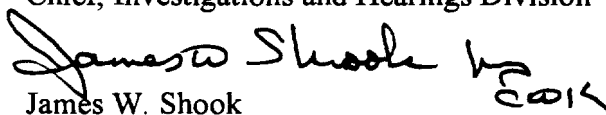
¹¹ See also Sections 309(b) and (d) of the Act, 47 U.S.C. § 309(b) and (d).

¹² Cf. Normandy (The Bureau reviewed the amendment of the challenging applicant and reported that the substitute was fully qualified to be a licensee); Atkins Broadcasting, 8 FCC Rcd 6321 (Mass Media Bur. 1993) (In distress sale situation, the Bureau exercised delegated authority to grant assignment and terminate hearing proceeding); RKO General, Inc. (WHBQ), 3 FCC Rcd 5055 (1988) (The Commission approved a settlement which resulted in the license ultimately passing to the assignee of the challenging applicant. The assignment application had received a file number and had been processed accordingly).

10. Conclusion. Accordingly, the Bureau submits that the Commission should grant the Joint Request to the extent indicated, but not take final action until the Mass Media Bureau can determine whether Holdings is qualified as licensee for channel 18.

Respectfully submitted,
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April 19, 2000

CERTIFICATE OF SERVICE

Karen Richardson, secretary of the Enforcement Bureau's Investigations and Hearings Division certifies that she has on this 19th day of April, 2000, sent by facsimile or served by hand copies of the foregoing "Enforcement Bureau's Comments in Support of Joint Request for Approval of Settlement Agreement" to:

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